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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS RENE BACCHUS, Defendant and Appellant.	B287332 (Los Angeles County Super. Ct. No. MA072059)

APPEAL from the judgment of the Superior Court of Los Angeles County. Shannon Knight, Judge. Affirmed in part, and remanded with directions.

Rudolph J. Alejo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Travis Rene Bacchus appeals from his conviction by jury of possession of metal knuckles and making criminal threats. The court also found true that defendant had suffered a prior conviction for a violent or serious felony within the meaning of the "Three Strikes" law. Defendant was sentenced to a state prison term of seven years eight months. Defendant raises two claims of instructional error, and also contends reversal is mandated because his conviction for possession of metal knuckles is not supported by substantial evidence. In supplemental briefing, defendant argues remand for resentencing is warranted in light of the passage of Senate Bill No. 1393 during the pendency of this appeal which amended Penal Code sections 667 and 1385.

We affirm the judgment of conviction, but remand for a resentencing hearing to allow the trial court the opportunity to exercise its newly granted discretion with respect to the five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1).

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by amended information with possession of metal knuckles (Pen. Code, § 21810 [count 1]), and criminal threats (§ 422, subd. (a) [count 2]). It was also alleged defendant had suffered a prior conviction for a violent and serious felony (criminal threats) within the meaning of the Three Strikes law (§ 667, subds. (a)-(j), § 1170.12).

The evidence and testimony received at trial revealed the following material facts.

Michael Hollins operated several homes in the Lancaster area as residences for homeless individuals. Mr. Hollins knew defendant because he had rented a room in one of his houses for a

period of time. In August 2017, defendant was no longer living in one of Mr. Hollins's homes, having moved out a few months earlier.

Sometime around 9:30 p.m. on August 26, 2017, Mr. Hollins went to one of his houses located on J Street in Lancaster to check on the residents. When he arrived, he noticed a lot of activity at a neighbor's home where everyone was watching a fight on a television set up in the garage. He also saw defendant's white Nissan parked in front of his house with the driver's side door open. The record is not clear, but it appears defendant was standing near the car talking with some of the other people who had come over to watch the fight. Mr. Hollins knew the Nissan was defendant's car because it was the same car he had driven when he lived at one of Mr. Hollins's homes. Mr. Hollins had, on occasion, seen other people drive it, but he knew it was defendant's car.

Mr. Hollins was concerned the door, opened toward the street, made it difficult for traffic to pass by. Since he regularly received complaints from neighbors about loud music and other issues with the residents, he did not want a problem. Mr. Hollins asked defendant to close the door. Defendant said no, "why should I? You can get by."

Mr. Hollins walked up to the car and closed the door. Mr. Hollins denied touching, pushing or provoking defendant in any way. Defendant immediately "jumped" toward Mr. Hollins and confronted him in a "hostile and violent" manner. Other people standing around tried to get in between them and told them to "[j]ust let it go." Defendant said "[n]o, I am tired of this n----r." He began to cuss at and threaten Mr. Hollins. "You a dead man." He kept saying "you a dead man" as he got into the

Nissan. Defendant said something to the effect of "I want to see blood from you. I want to kill you." He then drove off.

Mr. Hollins, who had been backing away as defendant yelled at him, got into his car and followed defendant. He wanted to see where defendant was going so he could give an accurate location and description to tell police.

When asked if he was afraid at that time, Mr. Hollins said he was "concerned" with where defendant was going, "and what's he going to get to kill me. So I wanted to know where he was going." He was also concerned defendant would come back and "shoot up the house" and possibly hurt the other residents. He had his cell phone with him so he could call 911. Mr. Hollins turned his car around and called 911. He drove back to J Street, parked his car around the corner and walked back toward his rental houses.

There was a car parked in the driveway. Mr. Hollins crouched down behind it. Defendant returned about 10 to 15 minutes later, driving slowly down the street, brandishing a gun out the window and yelling repeatedly "[w]here is he at? I am going to kill him."

Mr. Hollins was again asked if he was afraid of defendant. He responded, "[w]ell, of course. That's why I ducked down. I mean come on, man. I saw a gun." Mr. Hollins said he was fearful when he spoke with the 911 operator, who told him he should continue to stay hidden and wait for the officers to arrive. The recording of the call was played for the jury. At one point, the operator tells Mr. Hollins to stop screaming. Mr. Hollins explained he was agitated and upset when he called 911. "I was running for my life, I felt like, you know, because once they showed back with the weapon, just like he said, he was – he is

coming back to kill me. Of course I was hysterical." Mr. Hollins eventually went back around the corner to hide. The police arrived within a few minutes. Defendant had driven off down the street.

On cross-examination, Mr. Hollins conceded he had not had any problems with defendant having drugs in the home or causing problems when he was a resident. On the night of the altercation, Mr. Hollins recalled Chapman Rogers, another individual he had helped with housing, being in the passenger seat of defendant's car. He did not recall Mr. Rogers ever getting out of the car at any point. Mr. Hollins said that when defendant initially threatened him that night and started to get into his car to drive away, he told defendant something like "kill me now if you're going to kill me." To the extent his testimony differed from what he said to the 911 operator, Mr. Hollins said he was "very nervous" when he was speaking with the operator.

On the evening of August 26, 2017, Deputy Sheriff Adam Nelson and his partner were on patrol in the city of Lancaster and responded to the radio call prompted by Mr. Hollins's call to 911. The radio call reported that the suspect who had made threats and brandished a weapon was driving an older model white Nissan. Deputy Nelson and his partner found the Nissan parked near an apartment building on 10th Street West. Deputy Nelson could see a male, later identified as defendant, sitting in the driver seat of the car. No one else was in the car. When defendant saw Deputy Nelson pull up in his marked patrol car, he ran from the car and into one of the apartments. Deputy Nelson called for backup.

After the additional deputies arrived on the scene, they knocked on the apartment door. Defendant answered. After

admitting to the deputies that he was on felony probation, defendant was detained. The apartment was searched and several BB guns were located. When Deputy Nelson searched defendant's Nissan, he found a pair of metal knuckles under the driver's seat. They were within reach of someone seated in the driver's seat.

Detective David Clark testified that, after defendant was arrested, Mr. Hollins came to the station and identified him as the person who had threatened to kill him.

Defendant called Mr. Rogers to testify. Mr. Rogers met defendant when they shared a room together in transitional housing. He knew Mr. Hollins because he rented a room from him. Mr. Rogers knew Mr. Hollins to be a pastor at a church who had rental houses. He later believed Mr. Hollins to be a dishonest person because he tried "to extort" additional rent from him beyond the amount he had told him the room would cost.

On August 26, 2017, he and defendant had some drinks and then went to a friend's home on J Street to watch a fight on television. He said when Mr. Hollins arrived later that evening, defendant "confronted" Mr. Hollins. The two argued about a room that Mr. Hollins had apparently promised to defendant. Mr. Rogers said it was Mr. Hollins who got loud and angry and put his hands on defendant first. Defendant responded by telling Mr. Hollins not to put his hands on him. Mr. Hollins also cursed at Mr. Rogers and tried to open the front passenger door, telling him to get out of the car. Another friend who was watching the fight "jumped in the middle" at that point to try to calm things down. Mr. Rogers denied ever hearing defendant threaten Mr. Hollins in any way or say that he was going to kill him. Mr. Rogers and defendant then left in defendant's car, and

Mr. Hollins pursued them in his car, "swerving" at them and trying to hit them.

The jury found defendant guilty as charged. In a bifurcated proceeding, the court found true the allegation that defendant had suffered a prior strike. The court also denied defendant's motion to strike the prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court sentenced defendant to a state prison term of seven years eight months calculated as follows: the low term of 16 months on count 2 (the base count), doubled due to the prior strike; a concurrent 16-month term on count 1, doubled due to the strike; plus a consecutive five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1). The court awarded defendant 220 days of custody credits and imposed various fines and fees.

This appeal followed. After briefing was complete, we granted defendant's request to submit supplemental briefing on the applicability of Senate Bill No. 1393.

DISCUSSION

1. The Substantial Evidence Claim

Defendant contends there is insufficient evidence establishing the requisite knowledge for possession of metal knuckles. He argues the prosecution established only the presence of the metal knuckles, hidden from view, in a car over which he did not have exclusive control, and that no other evidence tied him to the metal knuckles.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*Rodriguez,* at p. 11.) Applying this standard, defendant's argument fails to persuade us reversal is warranted.

Penal Code section 21810 provides, in relevant part, that "any person . . . who . . . possesses any metal knuckles is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170." To establish possession of illegal contraband, like metal knuckles, it need *not* be shown that the defendant's possession was exclusive. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) "A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others." (*Ibid*.) Further, a defendant "may have either actual or constructive possession of any article [of contraband]. The latter is established by showing a knowing exercise of dominion and control over [the] item" (*People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272), or "over the place where it is found." (*People v. Rushing*, at p. 622; see also 2 Witkin, Cal. Crim. Law (4th ed. 2012) Crimes Against Pub. Peace & Welf., § 212, p. 903.) Moreover, "it is not necessary to prove malicious intent or wrongful use of the weapon." (2 Witkin, *supra*, § 212, p. 903.)

When defendant was found and arrested, he was first seen by the deputies seated in the driver's seat of the white Nissan. No one else was in the car. The testimony was undisputed that the Nissan belonged to defendant, although Mr. Hollins conceded that *in the past* he had seen other individuals driving it, in addition to defendant. Deputy Nelson said defendant immediately fled from the car when defendant saw him pull up in his patrol car. The metal knuckles were located under the driver's seat of the Nissan within reach of someone seated in the driver's seat. That evidence, and reasonable inferences therefrom, were sufficient to establish knowing possession by defendant of the metal knuckles.

The requisite possession and knowledge "may be proved by circumstantial evidence and any reasonable inferences drawn from such evidence." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) For example, a defendant's knowledge he possesses illegal contraband "may be shown by *evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt*, such as an attempt to flee or an attempt to hide or dispose of the contraband." (*Ibid*., italics added; accord, *People v. Vasquez* (1969) 1 Cal.App.3d 769, 777-778 [it is "well settled" that knowledge "may be proved by circumstantial evidence; that furtive action or other suspicious conduct on the part of the accused may be sufficient; that exclusive possession of the premises in which the contraband was found need not be proved; and that immediate physical possession is not of the essence"].)

Defendant's reliance on *People v. Antista* (1954) 129 Cal.App.2d 47 (*Antista*) is unavailing. There, the defendant had not been at home for hours when marijuana was found in his home, along with two other individuals, including a woman who

routinely stayed in and used defendant's home. In reversing the defendant's conviction, the *Antista* court explained "[o]ur opinion takes into consideration a set of facts that are unique. Defendant was not shown to be a user of marihuana [*sic*] or narcotics or to have had any connection with them. He consistently denied knowledge of the marihuana. [*Sic.*] He did not have the exclusive use of his apartment. Miss Rivers, a user of narcotics, for no explained reason, frequently came to the apartment. Upon the important question whether [defendant] had exclusive use of the apartment, the evidence was the others came in to watch television and that the apartment was available for their use whether defendant was present or absent." (*Id.* at p. 52.)

The facts are not similar here, and nothing in *Antista* altered the law that a defendant's furtive conduct can raise an inference of the requisite knowledge.

2. The Jury Instructions

a. Possession of metal knuckles (count 1)

Defendant contends the court prejudicially erred by giving misleading instructions on the requisite mental state for possession of metal knuckles. Defendant argues that while possession of metal knuckles is a general intent crime, it specifically requires knowledge and therefore, according to the Bench Notes for CALCRIM No. 252, the instruction should not have been given. According to defendant, the effect of giving CALCRIM No. 252 in combination with CALCRIM No. 2500 served only to confuse the jury, and in essence, removed knowledge as an element of the offense.

We independently review defendant's claimed instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

As an initial matter, respondent argues defendant forfeited this contention by failing to object. The record shows that the court gave counsel copies of the instructions it proposed to give to the jury, including CALCRIM No. 252, and defense counsel did not object. Any appellate challenge to the court's giving of CALCRIM No. 252 was thus forfeited. (See, e.g., *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233.) Defendant contends his substantial rights were affected and therefore no objection was necessary. The case law generally describes a defendant's substantial rights as being affected only where the error has resulted in a miscarriage of justice. (*Ibid.*) Defendant has not shown a miscarriage of justice resulted from the court's giving of CALCRIM No. 252.

In any event, even if we considered the merits of defendant's argument, we would reject it.

Possession of metal knuckles is a general intent crime. (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 545 [discussing former Pen. Code, § 12020, subd. (a)(1), predecessor to § 21810]; see also *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [" 'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent.' "].)

Defendant was also charged with a specific intent crime, criminal threats. Therefore, the court instructed with CALCRIM No. 252 as follows: "The crimes charged in Counts 1 and 2 require proof of the union, or joint operation, of act and wrongful intent. [¶] The following crime requires general criminal intent: possession of metal knuckles, as charged in Count 1. For you to

find a person guilty of this crime, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime. [¶] The following crime requires a specific intent or mental state: criminal threats, as charged in Count 2. For you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime."

Defendant cites to the Bench Notes for CALCRIM No. 252 which state that "[i]f the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense." (Bench Notes to CALCRIM No. 252 (2017 ed.) p. 69.)[1]

The modified version of CALCRIM No. 252 given to the jury did not include the modified third paragraph instructing that the mental state required for the crime of possession of metal knuckles was defendant's knowledge that he possessed metal knuckles. But the trial court instructed the jury with CALCRIM No. 2500, which instructed that the prosecution had to prove all the elements of the crime, including that defendant knew he possessed the metal knuckles, in order for the jury to convict him on count 1. Thus, the third paragraph of CALCRIM

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[1] We cite to the version of CALCRIM No. 252 in effect at the time of trial.

No. 252 would have been repetitive of CALCRIM No. 2500 in instructing the jury on the mental state required to prove possession of metal knuckles.

The court properly instructed with CALCRIM No. 2500 regarding the elements of possession of metal knuckles: "The defendant is charged in Count 1 with unlawfully possessing a weapon, specifically metal knuckles in violation of Penal Code section 21810. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed metal knuckles; [¶] 2. The defendant knew that he possessed the metal knuckles; [¶] 3. The defendant knew that the object was metal knuckles. [¶] The People do not have to prove that the defendant intended to use the object as a weapon. [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

Further, the court instructed the jurors to read and consider the instructions as a whole, and that if they believed any of the attorneys' argument conflicted with the instructions, they were to follow the court's instructions. (CALCRIM No. 200.) Just before the start of closing arguments, the court underscored this instruction for the jurors, explaining that "the statements of counsel are not evidence. They are simply going to give you their perspectives on what they believe the evidence has shown. [¶] . . . [¶] If anything that counsel say conflicts with my instructions on the law, you must follow my instructions."

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the

charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

We find no reasonable likelihood the jury would have considered CALCRIM No. 252 in isolation and misconstrued it as eliminating the knowledge element set forth in the more specific CALCRIM No. 2500. Rather, we find it likely that, consistent with the court's instructions, the jury considered the instructions as a whole and understood the prosecution was required to prove defendant's knowledge beyond a reasonable doubt. " ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' " (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

The dissent asserts that CALCRIM No. 2500 was "cancelled out" by the giving of CALCRIM No. 252. We do not agree. CALCRIM No. 252 correctly identified count 1 as a general intent crime, and also specifically instructed the jurors to look to the instruction "for that crime" to find the explanation of what mental state the prosecution was required to prove. CALCRIM No. 252 told the jury: "For you to find a person guilty of [possession of metal knuckles], that person must not only

commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime."

Thus, CALCRIM No. 252 and CALCRIM No. 2500 were not inherently contradictory as were the instructions found infirm in *People v. Valenti* (2016) 243 Cal.App.4th 1140, superseded by statute on other grounds as stated in *People v. Brooks* (2018) 23 Cal.App.5th 932, 945, footnote 17. In *Valenti*, the defendant was charged with a violation of Penal Code section 647.6 which required the prosecution to prove the defendant was motivated by an unnatural sexual interest in a child. (*Valenti,* at pp. 1164-1165.) The court there correctly instructed the jury with CALCRIM No. 1122 specifying that such a motive was a required element, but also instructed with CALCRIM No. 370 which stated that the prosecution need not prove motive. (*Valenti,* at pp. 1164-1165.) The court here never instructed the jury that the prosecution need not prove any required mental state. To the contrary, the court instructed the jury to refer to the instruction on the elements of the crime of possession of metal knuckles for an explanation of the required mental state.

We also disagree with the dissent's assessment that the prosecutor's argument "compounded" the instructional error. The prosecutor told the jury in his opening argument, "If I haven't proved all the elements – I'll show you what they are – if I haven't proved all the elements, you don't have a crime, and that's not guilty. If you do have all the elements, that's guilty." Moments later, when telling the jury the elements of the crime, the prosecutor specifically stated, "[a]nd, of course, I have to

prove that [defendant] knew that this object is metal knuckles." Defense counsel pointed out that knowledge was required and asserted there was no evidence defendant had any knowledge the brass knuckles were in the car. While both counsel focused more on defining actual versus constructive possession, there is simply no support in the record for the notion that a reasonable juror might be misled by the instructions or argument as to the required mental state to prove possession of metal knuckles.

Assuming it was error for the court to fail to comply with the bench note, any error was harmless beyond a reasonable doubt.

b. Criminal threats (count 2)

Defendant also contends the court committed instructional error by failing to instruct on attempted criminal threats as a lesser included offense on count 2. We disagree.

"An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense. [Citation.] *'[E]very* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury.' " (*People v. Thomas* (2012) 53 Cal.4th 771, 813 (*Thomas*).)

The court did not err in failing to give an instruction on attempted criminal threats. Defendant contends that in order to be guilty of making criminal threats, the victim must experience "sustained fear." Defendant argues the evidence showed that the victim, Mr. Hollins, was not in sustained fear and that Mr. Rogers raised issues about Mr. Hollins's credibility. Therefore, he contends instruction on the lesser included attempted criminal threats was warranted.

There is substantial evidence that Mr. Hollins suffered sustained fear. He consistently and repeatedly testified that he feared for his life and was "hysterical" and distraught that evening because of defendant's threats. The 911 call was played for the jury in which the operator had to calm down Mr. Hollins and tell him to stop screaming into the phone, corroborating his stated level of distress.

Assuming error for the purposes of argument, it was harmless as there is no reasonable probability defendant would have obtained a more favorable outcome. (*Thomas*, *supra*, 53 Cal.4th at p. 814 ["failure to instruct on a lesser included offense in a noncapital case does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome' "].)

3. Senate Bill No. 1393

In September 2018, during the pendency of this appeal, the Governor signed Senate Bill No. 1393. As relevant here, the bill amended provisions of Penal Code section 667 and section 1385, restoring the discretion of trial courts to strike a prior serious felony conviction in connection with imposition of the five-year enhancement set forth in section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1, § 2.) We granted the parties the opportunity to submit supplemental briefing addressing this new legislation.

In *In re Estrada* (1965) 63 Cal.2d 740, 744-745, the California Supreme Court held that, absent evidence of contrary legislative intent, it is an "inevitable inference" that the Legislature meant for new statutes that reduce the punishment for certain prohibited acts to apply retroactively to every case not yet final on appeal. Defendant and respondent agree that Senate

Bill No. 1393 applies retroactively to cases not yet final on appeal. We concur.

Respondent however, argues the issue is not ripe for resolution because the statutory amendments will not go into effect until January 1, 2019.

For the purpose of determining the retroactive application of an amendment to a criminal statute, a judgment is not final until the time has passed for petitioning for a writ of certiorari in the United States Supreme Court. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) Defendant's case was submitted on December 20, 2018. Even if we had issued our opinion immediately, it would not become final until 30 days thereafter. (Cal. Rules of Court, rule 8.366(b)(1).) If one or more parties filed a petition for rehearing, the date of finality would be extended even further. (Cal. Rules of Court, rule 8.268(b)(1)(A) [a party may "file a petition for rehearing within 15 days after" the "filing of the decision"].) The parties would then have 10 days after the decision became final to petition for review in the California Supreme Court. (Cal. Rules of Court, rule 8.500(e)(1) ["A petition for review must be served and filed within 10 days after the Court of Appeal decision is final. . . ."].) Only after a petition for review has been adjudicated can a party then petition for a writ of certiorari in the United States Supreme Court.

Thus, defendant's appeal will not become final until after the statutory amendments go into effect on January 1, 2019. Defendant is entitled to the benefit of the retroactivity of the statutory amendments. We therefore remand the matter to the trial court for resentencing pursuant to Senate Bill No. 1393. As with reconsideration of a firearm enhancement under Penal Code section 12022.53, subdivision (h), the trial court on remand may

exercise its discretion under Senate Bill No. 1393, to strike the prior felony enhancement or impose it. In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a).) We remind the court to consider the factors specified in California Rules of Court, rule 4.428(b) in making its determination.

DISPOSITION

The matter is remanded to the trial court for resentencing. On remand, the trial court shall exercise its discretion to strike or dismiss the prior felony enhancement as authorized by Senate Bill No. 1393.

The judgment is affirmed in all other respects.

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

STRATTON, J:

I dissent from the court's affirmance of count 1, possession of metal knuckles. I concur in the rest of the disposition.

Possession of metal knuckles is a general intent crime which requires proof of knowledge as one of its elements. Here the trial court gave the first two paragraphs of CALCRIM No. 252 which define for the jury the concept of general intent. So far, so good. However, the trial court omitted the third and fourth paragraphs which would have instructed the jury that even though possession of metal knuckles requires only general intent, it also requires knowledge by the defendant here that he had possession of the prohibited object. But, the court gave CALCRIM No. 2500 as well, correctly instructing the jury on the elements of the offense, including the element of knowledge. So what's the problem, you might ask?

People v. Hill (1967) 67 Cal.2d 105 (*Hill*) governs our analysis here. In *Hill*, defendant was charged with commercial burglary, a specific intent crime. The court gave a general intent instruction as well as a specific intent instruction. The court held it was error to give conflicting instructions on the mental state required for the charged crime because the jurors might infer specific intent from the intentional doing of the act proscribed. (*Id*. at p. 118.)

The holding in *Hill* has been reinforced by the Bench Notes to CALCRIM No. 252 which make plain that the trial court, if giving this instruction where knowledge is an element of the charged crime, must expressly restate the element of knowledge: "The court should specify for the jury which offenses require general criminal intent and which require a specific intent or mental state by inserting the names of the offenses where

indicated in the instruction. (See [*Hill, supra*, 67 Cal.3d at p. 118].) If the crime requires a specific mental state, such as knowledge or malice, the court **must** insert the name of the offense in the third paragraph, explaining the mental state requirement, even if the crime is classified as a general intent offense." Our case falls under the "**must**" rubric: it presents an offense classified as a general intent crime with a knowledge requirement.

If the Bench Notes are to be followed, the trial court should have given the third and fourth paragraphs to ensure that the jury did not end up confusing the concepts of general intent and knowledge by substituting a finding of general intent for knowledge.

The court finds no error because the two instructions were not expressly contradictory. It is true the two instructions are not expressly irreconcilable. However, by giving the incomplete version of CALCRIM No. 252 alongside the correct instruction on the charged crime, the trial court effectively confounded the knowledge element by informing the jurors they need only find concurrence of the act and general criminal intent. The full instruction, with all four paragraphs, would have made clear to the jury that general intent is separate and distinct from the knowledge requirement. CALCRIM No. 2500 does not make that distinction by itself.

Perhaps lawyers and judges instinctively recognize the distinction between general intent and a knowledge requirement, but it is a herculean task to ask a jury to make that distinction without explicit instructions explaining expressly that they are two separate concepts. No doubt this is the point of the Bench Notes. CALCRIM No. 252 was drafted with all four paragraphs

to accomplish this herculean task of preventing likely conflation of the concepts. In my mind, the correct instruction on knowledge was cancelled out – or at least, lost in the shuffle. This was error under *Hill* as interpreted by the Bench Notes which emphasize that the trial court **must** give all four paragraphs where, as here, knowledge is required for a general intent crime. (See also *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [competing mental state instructions are error even if "the court's instructions on the offense itself correctly explain the required intent because we have 'no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict' "].) Here, we don't know if the jury correctly kept these concepts separate and made separate findings or conflated the two.

An error that misdescribes the prosecution's burden of proving each element of the offense requires reversal unless it is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Higgins* (2006) 38 Cal.4th 175, 211–211.) In performing this analysis, we ask whether the state has demonstrated beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California*, at pp. 24, 26.)

Looking at the record as a whole, I cannot conclude the error here did not contribute to the verdict. Failure to prove knowledge was defendant's sole defense to the charge. The evidence against defendant as to knowledge was not strong. It consisted of the fact that defendant was sitting in the car where the metal knuckles were hidden and ran away from the parked car when law enforcement drove up. The metal knuckles were found under the driver's seat where defendant was seated. He

was driving the same car earlier that day when he had shouted criminal threats at Mr. Hollins. It was undisputed other persons had driven the same car recently, even if not on that day. Upon exchanging eye contact with the officer who spotted him sitting in the car, defendant ran away from the parked car into a nearby apartment. This happened almost right after defendant had committed the other crime he was charged with, criminal threats at Mr. Hollins. Thus, presence in the car and flight from the scene constituted the evidence in support of the conviction of possession of metal knuckles.

Proof of access to the place where contraband is found, without more, is not sufficient to support a finding of unlawful possession. (*People v. Hunt* (1971) 4 Cal.3d 231, 235.) This principle lends importance to the evidence of flight in this case to prove knowledge. But even the evidence of flight here was ambiguous – defendant had just committed the serious felony of making criminal threats in the very car he later ran away from when he saw law enforcement. Who can say if his flight from the car showed guilty knowledge of the metal knuckles or guilty knowledge of the death threats he had just shouted at Mr. Hollins from the very same car.

Defendant's entire theory of defense to the possession charge was lack of knowledge. The incomplete instructions effectively gutted his only defense to the charge. Moreover, the People's closing and rebuttal arguments compounded the court's error. As to the possession charge, the prosecution misdirected the jury as to the application of the knowledge requirement: "The metal knuckles count, that's count 1. . . . [¶] Here's what I got to prove for this one --This one is a little easier -- That the defendant possessed metal knuckles. [¶] . . . [¶] And, of course, I

have to prove that he knew that the object is metal knuckles. I'm not going to get a signed piece of paper that says, 'I know that metal knuckles are metal knuckles.' We have to use our common sense. [¶] Everybody knows, this is not a fork; this is not a hamburger; everybody knows what this is (indicating)." Then, in rebuttal the prosecution played somewhat fast and loose with the knowledge requirement by omitting it entirely, just as the general intent instruction did: "As I said in my opening and as the law says up there on the screen, you don't have to actually own something to possess it. You don't have to actually hold it. You don't have to actually touch it. It is enough if the person has control over it or even just the right to control. So if somebody drops something in your car, leaves, and then you're driving around, you have actual control over it, which means under the law, you have possession of it; just like under the law, Mr. Bacchus had possession of the brass knuckles." While the prosecution may have just been referring to actual versus constructive possession, the omission of any correct discussion of the element of knowledge perfectly complemented for the jury the incomplete version of CALCRIM No. 252.

Because the error is not harmless, I would reverse the conviction for possession of metal knuckles and remand that charge to the trial court for retrial.

STRATTON, J.